IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REGINALD T. GILBERTBEY,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO. 05-69E
v.	)	
	)	Judge Sean J. McLaughlin
UNITED STATES OF AMERICA, et al.,	)	Magistrate Judge Susan Paradise Baxter
	)	
Defendants.	)	*Electronically Filed*

THE FEDERAL DEFENDANTS' MOTION TO STRIKE
PLAINTIFF'S SECOND AMENDED COMPLAINT

AND NOW COMES, Defendants the United States of America, Department of Justice, Federal Bureau of Prisons, and FCI McKean ("Federal Defendants"), by their undersigned counsel, hereby file this Motion to Strike Plaintiff's Second Amended Complaint, and in support thereof state as follows:

1. On March 1, 2005, plaintiff Reginald T. Gilbertbey initiated this civil action.

2. On August 3, 2005, plaintiff filed an Amended Complaint[1].

3. Plaintiff failed to effect proper service upon Federal Defendants of the Complaint or Amended Complaint. Nevertheless, on June 27, 2006 Federal Defendants filed their Motion to Dismiss, Or in the Alternative for Summary Judgement and Brief in support thereof.

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[1] The Amended Complaint sought only injunction relief and alleged that on May 17, 2005, after dinner, Plaintiff declared that he was on a "hunger strike". He then alleged that he was placed in isolation in the Special Housing Unit ("SHU"), threatened with forced feeding, and that his access to water was controlled by staff. The relief that Plaintiff sought in his Amended Complaint was an Order from the Court that the forced feeding be video-taped and that it not be done through his nasal passage. In addition, he requested the further injunctive relief that the Court order all copies from his Central file be provided at no cost; a stay of all pending disciplinary charges; and an immediate transfer to FMC Lexington.

4. On July 12, 2006, this Court Ordered Plaintiff to Respond to Defendant's Motion and permitted Plaintiff to file an Amended Complaint to "cure any procedural defects".

5. Approximately six months later, on November 17, 2006, plaintiff filed a Second Amended Complaint and a Response to Defendants' Motion to Dismiss or, in the alternative, Motion for Summary Judgment. Plaintiff subsequently filed a Motion Seeking Leave of the Court to Amend Complaint on November 21, 2006.

6. Plaintiffs Second Amended Complaint, however, does not purport to cure any procedural defects from his prior pleading but instead raises entirely **new and different claims** than those raised in the Complaint or First Amended Complaint. Indeed, the Second Amended Complaint does not address Plaintiff's "hunger strike" at FCI McKean at all, but raises new claims of exposure to Environmental Second Hand Smoke ("ETS") while incarcerated outside the jurisdiction of this Court at USP Terre Haute and USP Marion from 1993 to 1996. The Second Amended Complaint also alleges, for the first time, retaliation claims while at FCI Oakdale and USP Allenwood, also outside the jurisdiction of this Court.

7. Rule 15(a) of the Federal Rules of Civil Procedure states that leave to amend "shall be freely given," but only "when justice so requires." Fed. R. Civ. P. 15(a); see also Chitimacha Tribe of Louisiana v. Harry L. Laws Co., 690 F.2d 1157, 1163 (5th Cir. 1982) (explaining that "leave to amend should not be given automatically."). Accordingly, the Supreme Court has instructed that such leave is inappropriate where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993) (quoting Foman v. Davis, 371 U.S. 178, 183 (1962)). Courts have denied leave where "[a]mendment of the pleadings would add new and complex issues to a case already protracted

and complicated. It would require new discovery, additional hearings, and, likely, more appeals." Ross v. Houston Indep. School Dist., 699 F.2d 218, 229 (5^{th} Cir. 1983) (affirming denial of leave to file amendment that would add twenty-six (26) new parties based on undue delay and prejudice).

8. Because the Second Amended Complaint presents numerous disparate claims stemming from many different institutions outside this Court's jurisdiction, it would unduly prejudice the Federal Defendants. Indeed, the proposed Second Amended Complaint would only create confusion and complication because the claims that Plaintiff seeks to add are based on entirely different sets of facts, time frames, and institutions from those asserted in the Amended Complaint. These entirely new claims are being "added" to this case **over a year and a half** after Plaintiff filed his original Complaint in this case and **six months** after Federal Defendants moved to dismiss his Amended Complaint.

9. Plaintiff's attempt to bring wholly new and disparate claims from many different institutions outside this Court's jurisdiction also violates Fed. R.Civ.P. 18 and 20. Pursuant to Rule 20 of the Federal Rules of Civil Procedure, defendants may be joined in a single action only where certain requirements have been met. Specifically, Rule 20 provides that defendants may be joined in an action where the claims arise out the same transaction, occurrence, or series of transactions and occurrences and if any question of law or fact common to all defendants will arise in the action. Moreover, Rule 18, which permits joinder of multiple claims against a party does not trump Rule 20's requirements because "despite the broad language of Rule 18(a), plaintiff may join multiple defendants in a single action only if plaintiff asserts at least one claim to relief as to each defendant that arises out of the same transaction or occurrence and presents questions of law or fact common to all." Intercon Research Associates, Ltd., v. Dresser Industries, Inc., 696 F.2d 53, 57 (7^{th} Cir. 1982).

10. Finally, because the majority of acts or omissions that plaintiff complains of in his Second Amended Complaint occurred at institutions outside this Court's jurisdiction, USP Terre Haute, USP Marion, FCI Oakdale and USP Allenwood and because Plaintiff no longer resides in this judicial district, venue is not proper in this Court for the majority of Plaintiff's claims in his Second Amended Complaint. See 28 U.S.C. § 1402(b) ("Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred."); see also 28 U.S.C. § 1404(a) (authorizing a district court to transfer a case to another district for the convenience of parties and witnesses, or in the interest of justice).

11. Simply stated, Plaintiff's Second Amended Complaint does not purport to "cure any procedural defects" as the Court permitted, but instead is a thinly veiled attempt to circumvent the filing fee and service requirements for the filing of an entirely new action. His claims are wholly dissimilar from those raised in the First Amended Complaint and fully addressed in Defendant's Motion to Dismiss six months ago. Further, Plaintiff is not incarcerated in this jurisdiction, his claims relate mainly to institutions outside this Court's jurisdiction, and the filing of such a new action in the guise of a Second Amended Complaint is not appropriate.

WHEREFORE, the Federal Defendants respectfully request that the Court grant their Motion To Strike Plaintiff's Second Amended Complaint.[2]

A proposed order is attached.

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[2] Should this Court deny Defendant's Motion to Strike, Defendant will respectfully request 60 days to respond to the Second Amended Complaint so as to properly investigate all of Plaintiff's new claims from the different institutions.

Respectfully submitted,

MARY BETH BUCHANAN
United States Attorney

/s/Jessica Lieber Smolar
JESSICA LIEBER SMOLAR
Assistant U.S. Attorney
Western District of PA
700 Grant Street, Suite 4000
Pittsburgh, PA 15219
(412) 894-7419
PA ID No. 65406

Counsel for Federal Defendants

Dated: November 22, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2006, a true and correct copy of the foregoing pleading was served by first-class U.S. mail, to the following:

Reginald T. Gilbertbey
Reg. No. 03854-078
U.S. Penitentiary, Allenwood
P.O. Box 3500
White Deer, PA 17887

/s/Jessica Lieber Smolar
JESSICA LIEBER SMOLAR
Assistant U.S. Attorney